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**VIA E-MAIL**

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**Re: Portland Harbor Superfund Site – UAO for Remedial Design in the River Mile 2 East Project Area**

Dear Ms. Mairs and Ms. DeMaria:

We provide this letter on behalf of EVRAZ Inc. NA ("Evraz") in response to Paragraph 38 of the Unilateral Administrative Order for Remedial Design at the River Mile 2 East Project Area, CERCLA Docket No. 10-2020-51 ("UAO" or "Order"). That Order was signed on March 26, 2020 and issued to Evraz by email on that same date.

We are also transmitting along with this letter a set of redlines and comments on the Order and the attached statement of work ("SOW"). Evraz hereby requests that EPA make the requested changes that are contained in those redlines.

Paragraph 38 of the Order provides an opportunity for Evraz to submit comments on the Order. By submitting these comments, Evraz does not limit in any way its right to assert defenses, including "sufficient cause" defenses, to the Order under Section 106(b) of CERCLA. Evraz also reserves its rights to raise any defenses at any time they may become applicable, whether or not they are mentioned in this letter.

Paragraph 41 of the Order purports to require Evraz to "describe, using facts that exist on or prior to the Effective Date, any "sufficient cause" defenses asserted by Respondent under Sections 106(b) and 107(c)(3) of CERCLA…." Evraz expressly disclaims this purported obligation. EPA does not have the legal authority to compel such a disclosure, and it is unlawful for EPA to so assert.

Notwithstanding the foregoing, Evraz provides the comments and information below, including its understanding of certain provisions of the Order. Please let us know if you have any questions about this letter, or any parts of it.

In brief, Evraz believes that it has sufficient cause to assert that portions of the Order may not be legally enforceable for at least the following reasons.

1. The Order directs Evraz to implement Work in areas of the Site for which Evraz has no liability under CERCLA.

2. The Order contains factual errors, misstatements, and irrelevancies that do not support EPA's determination with respect to the Order, the SOW, and Evraz's putative liability for the Work under the Order.

3. The Order is invalid because, contrary to EPA's guidance and procedures, the Order was arbitrarily and capriciously issued only to Evraz, and not to the many other liable parties that EPA has identified for the site, and who must contribute to the remediation of the site.

4. The Order arbitrarily directs Evraz to perform certain Work that will conflict with and overlap similar work being performed by another PRP under an agreement with Oregon DEQ. EPA has provided no guidance as to how Evraz is to implement the Work without producing conflicting results and without duplicative efforts.

5. The Order arbitrarily and capriciously orders Evraz to perform a remedial design for the RM 2 East work area before remedial work at upstream portions of the Site is completed. By requiring a remedial design at this stage, before the upstream remedial work has been completed, the work will be performed outside of a rational sequence. Consequently, the Order

creates vague requirements and imposes substantial costs without any concomitant health or environmental benefit.

6. EPA has failed to demonstrate that the Order will abate an imminent and substantial endangerment, particularly with respect to the portions of the Site for which Evraz may be liable.

7. Certain requirements of the Order are beyond EPA's authority under CERCLA Section 106.

8. Some or all of the ordered Work is inconsistent with the National Contingency Plan ("NCP"), arbitrary and capricious, or otherwise not in accordance with law.

Each of the above issues is outlined in greater detail below.

**1) The Order directs Evraz to implement Work in areas of the Site for which Evraz has no liability under CERCLA.**

The Evraz Rivergate Mill is located at river mile 2, upriver from the mouth of the Willamette River. Water and / or other materials discharged by the Mill during its operation would have been carried downstream at all times, except during periodic flow reversals caused by very limited tidal influences during extreme low flow periods during the summer.

Flow reversal can occur only when the tidally driven water level change is high enough relative to the downstream flow to cause upriver movement of the water column. To the limited extent that discharged particles (and associated contaminants) could travel upstream of the Mill outfalls during a flow reversal, almost all of those particles would have settled out within a few hundred meters upstream of the relevant outfall, or would have traveled back downstream when the flow reverted to the downstream direction.

Even at the farthest upstream locations where any Evraz-sourced particles could have traveled and settled to the sediments, the relatively light particles that could have reached that point would ultimately have been subsequently re-transported downstream of the Mill by river hydrodynamics. Therefore, Evraz has not contributed to, and therefore is not liable for contamination that is present upstream. Nor is Evraz responsible for any response actions or costs relating to sediments located upstream of the southern (upstream) boundary of the Rivergate Mill property.

**2) Factual Misstatements and Technical Errors.**

Evraz is concerned about the misleading, inaccurate, and unsupported allegations that are characterized as "factual findings" in the UAO. As EPA is aware, Evraz is participating in a

nonjudicial dispute resolution with other potentially responsible parties to allocate the costs associated with the Portland Harbor site. Statements that EPA asserts are "facts" in this UAO are likely to create an unjustified presumption that Evraz will have to disprove as it negotiates with other parties. This will make it more difficult to reach a resolution, which is in everyone's best interests.

By way of example, EPA makes numerous allegations related to timeframes when Evraz was not an owner or operator of facilities, without reference to prior or subsequent owners or operators; operations without a pathway to the river; and operations outside of the River Mile 2 East project area. Additionally, only vague references are made to other potential areas or sources, which could lead an uninformed reader to conclude mistakenly that Evraz is responsible for the site as a whole. No references are made to the site's significant upstream sources.

There are also technical issues. In particular, EPA has cited to outdated sampling data as support for its findings. This reliance is inappropriate given the significant riverbank remediation and stormwater source control that Evraz has completed. Historical contamination that is not present in the project area is not relevant and those references should be removed.

Evraz has provided numerous specific comments and proposed changes in the enclosed redline. However, given the short deadlines and limitations Evraz is facing during the global pandemic and from the ransomware attack we have discussed, EPA may have made other errors that have not yet been identified. Evraz reserves its rights to challenge all allegations included in the Order and SOW.

**3) The Order is invalid because it was issued only to Evraz.**

The Order is invalid because, contrary to EPA's guidance and procedures, it was arbitrarily and capriciously issued only to Evraz. *See, e.g.*, EPA, Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAOs) for RD/RA, OSWER Directive No. 9833.2c (June 20, 1991) ("We encourage you . . . to ensure that you avoid a bias, or even the appearance of a bias, toward issuing orders. . . . [W]e must continue to make reasonable efforts to identify all parties with CERCLA liability at a site and to arrange for or compel cleanup from as many of them as practicable.").

EPA has identified upwards of 10 other parties who had operations in the vicinity of River Mile 2 East, and who share liability for the site. When EPA began negotiations with the potentially liable parties over a year ago, Evraz was one of only two parties that indicated a willingness to negotiate for performance with EPA. Evraz made it clear to EPA, however, that it would be willing to perform only if other PRPs would participate, cooperate, support, and fund the work.

To Evraz's knowledge, EPA never conducted negotiations with any other party for performance of the work at River Mile 2 East. Nor did EPA seek, or attempt to facilitate

contributions from other PRPs for the Work. In mid-summer 2019, EPA cut off further project area negotiations with Evraz, and has now issued this Order to Evraz alone.

EPA's own guidance makes it clear that it is inappropriate for EPA to single out one PRP for enforcement, while allowing other PRPs to avoid responsibility. EPA has offered no material explanation for so disadvantaging Evraz to the benefit of the other PRPs.

Because EPA has failed to offer a reasoned explanation for issuing the Order to Evraz alone, contrary to EPA's own guidance, its actions are arbitrary and capricious.

**4) The Order arbitrarily directs Evraz to perform Work that will conflict with and partially overlap work being performed by another PRP under an agreement with Oregon DEQ.**

As we discussed with you at our conference on Thursday, April 9th, Simplot is under an agreement with Oregon DEQ to conduct a source control investigation of the Simplot property, including river bank and in-water property owned by Simplot. The Simplot mill is immediately upstream of the Evraz Rivergate Mill site. The Simplot property is also part of the work area for River Mile 2 East. Simplot is a PRP for the site, and was not issued an order by EPA.

The work required under the Simplot agreement with DEQ appears to be duplicative and / or potentially conflicting with the work required by the Order EPA has issued to Evraz. From our conversation with EPA staff on April 9th, it appears that EPA was unaware that DEQ had initiated such an agreement with Simplot.

Under paragraphs 4 and 42 of the Order, Evraz is required to perform all tasks under the Order. The Order and the Simplot agreement with DEQ relate to the same geographic areas. There is no basis for issuing the Order to Evraz, and not to Simplot. This is especially true since Simplot owns and operates on property that is the (partial) subject of the Order, where investigation is required to be conducted, and where Simplot has repeatedly refused access to parties under order with EPA to conduct investigation on Simplot-owned property.

This inequity is exacerbated by EPA's failure to coordinate EPA's asserted leadership oversight for the riverbank and in-water areas in the River Mile 2 East work area with DEQ's source control work and engagement with Simplot. The overlapping responsibilities created by the DEQ agreement and the Order, and EPA's failure to include a key party in the Order, is unjustified, arbitrary, and capricious. It also promises unreasonably to force Evraz to incur unnecessary and unwarranted costs in sorting out the various responsibilities with a party - - Simplot - - which has been entirely uncooperative with previous efforts to conduct investigative activities required by EPA.

**5) The Order arbitrarily and capriciously orders Evraz to perform a remedial design before remedial action work has been completed at upstream locations.**

By requiring a remedial design at this early stage, before upstream remedial action work has been completed, EPA is requiring Evraz to undertake unnecessary work too early in the remedial action process for the site. As a result, the River Mile 2 East design work will be performed under this Order outside of a rational sequence, and this Order will impose substantial and unnecessary costs without any concomitant health or environmental benefit.

There is no sound factual or legal basis for requiring Evraz to perform a 100% remedial design at this time. The River Mile 2 East work area is a depositional area, and subject to significant sedimentation. The area has undergone significant changes over the last 15 years, as is confirmed by bathymetry measurements recently completed.

Remedial actions upstream of the site will likely be going on over the next 15 years. During that time, the sediment conditions in the River Mile 2 East work area are likely to change significantly, and may be the subject of recontamination due to downstream transport of contaminants associated with the effects of dredging. If Evraz is to commence sampling and design work now, based on current conditions, the design will almost certainly be outdated by the time the River Mile 2 East area is ready for remedy implementation.

EPA has offered no pertinent rationale for the commencement of Remedial Design at River Mile 2 East in advance of the completion of upstream remedial construction activities.[1] The Remedial Design process is intended to result in plans and specifications that remove uncertainties about what remedial work should be done and how effective it is likely to be. By mandating a design before the upstream remedial actions are undertaken and completed, EPA exacerbates the uncertainty inherent in the remedy, and renders the Order arbitrary, capricious, and unenforceable.

The site-wide remedial action will likely require nearly two decades to implement. The conditions at River Mile 2 East have been steadily improving over the past two decades. There is no reasonable basis for mandating out-of-sequence design work, and no incremental protection of human health and the environmental that would warrant the incremental costs of such an approach.

[1] Although not a direct rationale, EPA did indicate that it has a conceptual site model supporting its timeframe. Evraz has not seen or been provided with a copy of this conceptual site model, which appears to conflict with experience at this and other sediment sites that have utilized a dredging remedy. Evraz requests that EPA provide its conceptual site model and all supporting analyses.

**6) EPA has failed to demonstrate that the Order will abate an imminent and substantial endangerment.**

Under CERCLA Section 106, EPA must determine that there may be an "imminent and substantial endangerment to the public health or welfare or the environment" before it can issue an order "as may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a). EPA has failed to demonstrate that any Site conditions in the River Mile 2 East work area pose an "imminent and substantial endangerment." Therefore the Order, which requires work only in that area, is invalid.

Even if there were such an imminent and substantial endangerment, the Order requires actions that would not abate an imminent and substantial endangerment if it, in fact, existed. The sediment conditions present in the River Mile 2 East work area have been there for over 20 years, since the listing of this site. Sediment conditions have only improved during that time.

None of the Work required by the Order will address sediments in the River Mile 2 East work area - - it is purely an investigation and design order. No remediation will occur for many years, further confirming that there is no basis to issue the Order against Evraz at this time.

While upstream work is taking place, natural recovery will likely continue to occur for several years in the River Mile 2 East work area. The need for sediment remediation in the River Mile 2 East work area, and the basis for any conclusions regarding the existence of an imminent and substantial endangerment related to Evraz's historical operations, should be reevaluated at the time the overall site remediation projects that will be conducted upstream are completed.

**7) Certain requirements of the Order are beyond EPA's authority under CERCLA Section 106.**

Paragraph 49 of the Order purports to require Evraz to seek and obtain rights to access properties that are not under Evraz's ownership or control for purposes of investigation and sampling. Paragraph 50 requires Evraz to use "best efforts" to do so. These provisions are unreasonable, and unenforceable, in light of EPA's knowledge, for over 2 years, of Simplot's unwillingness to allow access to its property for such purposes. It is improper for EPA to put Evraz in jeopardy of violation of the Order when it knows, in advance, that Evraz's ability to meet the obligations of the order, including the schedule in the SOW, are extremely limited, based on the past unwillingness of Simplot to allow such activities.

Paragraph 55 purports to require Evraz to provide financial assurance for the Work. Section 106 does not authorize EPA to require Respondents to provide the stated financial assurance. EPA does not have the authority under Section 106 to order PRPs to pay money to EPA for the Agency to undertake prospective response action. For the same reason, EPA does not have the authority to order Evraz to provide financial assurance. Moreover, such a requirement is not

necessary to protect human health or the environment, given that the Order otherwise requires the Evraz to perform the Work, and in light of the availability of many other PRPs who could step in to perform in Evraz's stead. EPA has no evidence that financial assurance has ever been necessary to ensure the completion of remedial action at this site, or at any other Superfund site with several large and financially sound companies as PRPs. Specifically with respect to Evraz, the Order is also invalid to the extent that it orders Evraz to provide financial assurance for Work in areas of the River for which Evraz is not liable under CERCLA.

Paragraph 76 of the Order requires Evraz to submit a certification regarding the lack of destruction or disposal of records "relating to its potential liability with regard to the Site" and requires Evraz to preserve all such documents until otherwise approved by EPA. Section 106 of CERCLA does not authorize EPA to mandate such a certification or perpetual document retention, which are irrelevant to the protection of public health and the environment. Similarly, Paragraph 74 requires document preservation for decades, without any showing that such preservation is necessary to protect public health and the environment.

Paragraph 72 of the Order refers to claims of business confidentiality that Evraz may make regarding certain documents. Evraz interprets these and all other Order provisions regarding access to documents and information as allowing it to assert attorney-client privilege, the work product doctrine, and any other privilege available under law, whether or not the privilege is specifically listed in the Order. Evraz believes that the Federal Rules of Evidence, the common law, and the U.S. Constitution provide sufficient cause for this position.

Paragraph 65 purports to require Evraz to notify EPA within 48 hours of the time it first "knew or should have known that a delay might occur". This requirement is so vague as to be unenforceable, as any event "might" later cause a delay.

Paragraph 67 purports to require Evraz to reimburse EPA, on demand, for response costs incurred by the United States in overseeing the Order. EPA does not have the authority under Section 106 to order PRPs to pay money to EPA. Evraz interprets these provisions as providing the procedures by which EPA may demand, and Evraz may reimburse, such oversight costs. In each case, Evraz reserves the right to seek appropriate documentation of EPA's oversight costs and to discuss such costs and their documentation with EPA prior to making any payment. Evraz further reserves its rights and defenses as to any specific written demand by EPA for payment of oversight costs. Evraz will make a determination at that time whether to pay all or any such costs. Evraz also notes that EPA has no authority to order Evraz to pay oversight costs incurred in connection with response action relating to portions of the Site for which Evraz is not liable under CERCLA.

Evraz reserves its rights and defenses with respect to all schedules and deadlines set by the Order and SOWs, to the extent that such schedules and deadlines may not be reasonably

achievable. EPA does not have the statutory authority to order compliance with schedules and deadlines that are not achievable, or reasonable.

**8) Some or all of the ordered Work is inconsistent with the NCP, arbitrary and capricious, or otherwise not in accordance with law.**

Portions of the Work required by the Order are inconsistent with the NCP, arbitrary and capricious, and not in accordance with law, for the reasons described in the following documents:

- Lower Willamette Group, Comments on Portland Harbor Proposed Plan (Sept. 6, 2016)

- Portland Harbor Participation and Common Interest Group, Comments on the United States Environmental Protection Agency's Superfund Proposed Plan for the Portland Harbor Superfund Site (Sept. 6, 2016)

- Petition for Modifications to the Portland Harbor Selected Remedy (submitted to the Administrator of the U.S. Environmental Protection Agency Mar. 9, 2020)

The above documents were submitted to the Administrative Record for the Site and the comments contained in those documents are incorporated here by reference, including all appendices and attachments to those documents.

EPA's Record of Decision ("ROD") adopted cleanup and remedial action levels that cannot be justified. EPA's remedy selection process was arbitrary and capricious and deeply flawed procedurally. The comments contained in the documents referenced above detail the many problems with EPA's ROD.

EPA has selected and adopted a remedy that prioritizes sediment removal as the primary remedial approach for areas above EPA's selected remedial action levels. Those levels are too restrictive, and are unnecessary to achieve EPA's risk reduction goals. Sediment removal is the most costly and least effective tool for this site for preventing risk to human health and the environment, and is likely to lead to increased risk in the River over the next 15-20 years. The result is that EPA's selected remedy is neither cost effective nor protective of human health and the environment.

For the reasons set forth in the above documents, and due to EPA's failure to act on the requested modifications to the ROD that are discussed in the Petition, the Order and SOW are contrary to the provisions of the NCP, arbitrary and capricious, and unlawfully require Evraz to perform work that is beyond the scope of what Evraz may permissibly be ordered to perform. Evraz objects to being forced to perform under an order that has not been lawfully issued.

The ROD and its supporting Remedial Investigation and Feasibility Study ("RI/FS") made several critical errors that EPA has failed to address or rectify, including but not limited to the following errors that are described in detail in the above documents:

- The ROD was based on a data set that EPA knew, and acknowledged at the time the ROD was issued, was out of date and would give an inaccurate picture of the river's condition.

- The estimate of current and future downstream PCB transport into the site was highly understated, thereby inflating the estimated benefits of sediment remediation and significantly underestimating the adverse impacts of continuing loading of new contamination into the site via downstream transport.

- The ROD erroneously overstated the benefits of dredging compared to natural recovery, by assuming Site-wide instantaneous implementation of dredging, ignoring the environmental impacts of the dredging process, and inaccurately predicting post-dredging PCB surface sediment concentrations.

- The Human Health Risk Assessment contained several errors that inflated the estimated risks posed by PCBs in River sediments, thereby inflating the estimated risk reduction from sediment remediation.

- The ROD places artificial restrictions on the use of engineered capping and sand covers as remediation technologies, arbitrarily increasing the time and cost of the remedy with no concomitant health or environmental benefits.

- EPA unlawfully adopted the National Flood Insurance Program regulations as an ARAR. By doing so, EPA intentionally attempted to prevent the use of simple and relatively inexpensive capping technologies as appropriate remedial alternatives. The result is an artificially and unnecessarily expensive remedy that is less protective of human health and the environment.

By this letter, Evraz has also transmitted a redlined version of the Order and SOW. Those documents contain requested changes and additional comments on the Order and SOW. Some reflect comments made here in the text of this letter. Others are specific to the terms of the Order and / or the SOW. Evraz hereby reiterates its request that EPA make the changes that are contained in those redlined drafts.

Nothing in this letter is intended to or should be construed to limit the claims and defenses that Evraz may raise in any future proceeding with EPA or otherwise. Evraz specifically reserves all of its rights and defenses regarding all future EPA decisions or actions. Evraz also reserves all

rights it has under Section 106(b)(2) of CERCLA to recover amounts expended to comply with all or part of the Order.

For the reasons set forth in this letter and in the redlines provided, the Order is invalid and unenforceable against Evraz. Nothing stated in this letter, nor any action taken by Evraz, including any action or decision to proceed with implementation of the Order, is an admission of any factual allegation or legal conclusion in the Order, or of any liability for any matters described in the Order.

In Paragraph 78, EPA reserves various rights and authorities. Evraz similarly, by this letter, reserves all of its rights and defenses regarding any future EPA actions or decisions under the provisions of the Order described above, and under all other provisions of the Order.

Please include this letter in the record for this matter. Evraz reserves the right to supplement the record at appropriate times as issues arise concerning the implementation of the Order.

Sincerely,

Beveridge & Diamond, P.C.
Counsel for Evraz Inc. NA

By Loren R. Dunn, Esq.
Principal

cc: Eileen Tierney, General Counsel and Corporate Secretary – EVRAZ Inc. NA
Debbie Silva, Environmental Specialist – EVRAZ Inc. NA